Supreme Court, U.S.
FILED

94 405 SEP - 2 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

GAETANO VASTOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. Whether on remand from this Court for further consideration in light of *United States v. Ojeda Rios*, 495 U.S. 257 (1990), the court of appeals disregarded that decision by holding that a *post hoc* explanation for failing to comply with the immediate sealing requirement of 18 U.S.C. § 2518(8)(a) may be supplied for the first time on remand and holding that an objectively unreasonable mistake of law may nevertheless be a "satisfactory explanation" for the failure?

2. Whether under 18 U.S.C. § 2518(8)(a), which provides that a satisfactory explanation for the absence of a seal on tape recordings of intercepted communications "shall be a prerequisite" for the "use" of the communications, an explanation for a delay in sealing tapes already used at trial may be supplied following conviction and appeal, years after suppression proceedings in which the Government failed to provide an explanation?

3. Whether the court of appeals, in remanding the case to the district court, correctly held that permitting the Government to offer a belated explanation for the sealing delay is a matter committed to the district court's "discretion"?

4. Since this Court held in *United States v. Ojeda Rios* that a misunderstanding of the law can be a satisfactory explanation for a sealing delay only if "objectively reasonable," once the court of appeals found here that the government attorney's "explanation was not objectively reasonable" was suppression required without further inquiry?

QUESTIONS PRESENTED

5. Whether the dissenter in the court of appeals was correct in stating that "[i]f the government's evidence in this case is sufficient to carry its burden of providing a 'satisfactory explanation' for failing to comply with the immediate sealing requirement of the statute, the requirement is reduced to a precatory entreaty"; "it is clear from *Ojeda Rios* that Congress intended something more"; and "[t]o hold that this record suffices to carry the government's burden under *Ojeda Rios* would effectively eliminate that burden and would ill serve the privacy concerns underlying the sealing requirement of the statute"?

6. Does a reviewing court's combined application of the presumptions of *Powell v. United States*, 469 U.S. 57 (1984), and of *Griffin v. United States*, 502 U.S. 46 (1991), to surmise *both* that the jury must have based its inconsistent RICO guilty verdict on a sufficient number of predicate offenses *and* that those predicate offenses must have been the ones supported by sufficient evidence, offend due process and diminish the right to trial by jury by increasing exponentially the risk the jury did not find sufficient evidence of guilt?

7. Under RICO, what constitutes conspiring with others to participate in the affairs of the enterprise, particularly where, as here, evidence of actually participating with those others in the affairs of the enterprise is held to be insufficient and where a requisite predicate is itself a conspiracy, one in which Petitioner did not agree to commit an unlawful act himself?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 25 F.3d 164, 989 F.2d 1318, 915 F.2d 865 and 899 F.2d 211, and are reprinted in the appendix at App. 1, App. 27, App. 58, and App. 89, respectively. The opinions of the district court are reported at 830 F.Supp. 250, 772 F.Supp. 1472, and 670 F.Supp. 1244, and are reprinted in the appendix at App. 163, App. 177 and App. 203, respectively. An opinion of the district court rendered from the bench is printed in the appendix at App. 295.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1994, and Petitioner's petition for rehearing was denied on June 16, 1994. This petition for a writ of certiorari is filed within ninety days of the order denying rehearing, in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1962 provides in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18, United States Code, Section 2518(8)(a) provides:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge

issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT OF THE CASE

1. Petitioner was indicted in 1986 in the District of New Jersey for federal racketeering offenses. The Government's trial proof would consist principally of tape recordings of conversations intercepted pursuant to court orders.

2. In his pretrial motions, filed in May 1987, Petitioner moved to suppress certain of those recordings on the grounds that the Government had failed to comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, specifically 18 U.S.C. § 2518(8)(a), by either submitting the tapes immediately to a judge for sealing or providing a satisfactory explanation for not doing so. At issue were 185 reels of tape recordings intercepted pursuant to an order obtained on March 15, 1985, and two orders of extension. The eavesdropping authorized by those orders terminated on May 31, 1985, but the recordings were not presented for sealing until July 15, 1985 – forty-five days later.

In responding to Petitioner's motion to suppress, the Government, although put on notice that a satisfactory explanation for the delay was required, did not provide the actual reason and explanation for the delay. Rather, the Government maintained that suppression was not warranted, because "the law in this circuit [is] that a delay in sealing tapes is not, in and of itself, sufficient grounds for suppression as long as the integrity of the tape recordings is preserved" and, since the integrity was preserved here, "these interceptions should not be suppressed notwithstanding the delay in judicial sealing." (Gov. Memo. of Law in Opposition at 109, 112, citing *United States v. Falcone*, 505 F.2d 478, 483-84 (3d Cir.), *cert. denied*, 420 U.S. 955 (1974).) In an opinion filed September 1, 1987, the district court agreed, concluding that "the integrity of the tapes has not been questioned, and thus suppression is not mandated." App. 286.

3. On appeal from the ensuing judgment of conviction, Petitioner, citing *United States v. Ojeda Rios*, 875 F.2d 17 (2d Cir. 1989), in which certiorari had recently been granted, argued that suppression was required for unexplained delays in sealing tapes even absent a showing of actual tampering. In response, the Government volunteered no explanation for the delay and maintained that a failure to seal promptly did not necessitate suppression, citing *Falcone*. (Gov. Brf. in court of appeals at 93-94.)

On March 20, 1990, the court of appeals, citing *Falcone*, rejected Petitioner's claim. App. 151. In other respects, Petitioner's judgment of conviction was affirmed in part and reversed in part. As to a RICO violation based on participating with others in the conduct of an enterprise's affairs through collection of an unlawful debt, the court of appeals held the evidence to be insufficient. App. 120-25. Yet the court at the same

time affirmed Petitioner's conviction of a RICO conspiracy, based on conspiring with the same individuals to conduct the affairs of the enterprise through collection of the same debt, concluding that Petitioner knew the loan was unlawful and "encouraged" others to collect it. App. 125-29. The court, on a cross-appeal by the Government, also reinstated a verdict of guilt on a count charging a RICO violation based on conducting an enterprise's affairs through a pattern of racketeering activity, which the district court had set aside as irrational in light of the jury's verdict on other counts and the court's instructions.[1] App. 110-119.

4. Petitioner sought a writ of certiorari in this Court, contending, *inter alia*, that when the Government offers no satisfactory explanation for a sealing delay, the intercepted conversations must be suppressed even absent a showing that the integrity of the recordings was impaired.

Following the filing of the petition, but before the filing of the United States' responding brief, the Court decided *United States v. Ojeda Rios*, 495 U.S. 257 (1990), holding that 18 U.S.C. § 2518(8)(a) applies to a delay in sealing tapes as well as a complete failure to seal, that the "satisfactory explanation" language of § 2518(8)(a) requires the Government to explain both why a delay occurred and why it is excusable, and that the plain words of the sealing provision foreclosed any argument that proof of nontampering is a substitute for a "satisfactory explanation." *Id.* at 263-64. In so holding, the Court overruled *United States v. Falcone*, 505 F.2d 478. *Ojeda Rios*, 495 U.S. at 265 n. 5.

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[1] The court of appeals also affirmed Petitioner's convictions on two non-RICO counts for conspiring to make and conspiring to collect an extortionate extension of credit.

The *Ojeda Rios* Court next considered whether the Government had established "good cause" for the sealing delays which occurred in that case, *id.* at 265, and concluded that the excuse advanced for the first time in this Court – the supervising attorney's misunderstanding of the law with respect to the term "extension" as used in § 2518(8)(a) – was "objectively reasonable," *id.* at 266. The Court noted, however, that the sufficiency of the explanation should be made on the basis of evidence which had been presented and submissions made in the district court, and that the explanation which the Government advanced for the first time in this Court is not a "satisfactory explanation" within the meaning of § 2518(8)(a) "unless it was relied on at the suppression hearing to explain the sealing delays." *Id.* at 267. The Court therefore remanded the matter "for a determination of whether the Government's explanation to the District Court corresponded to the explanation it now advances." *Id.*

Justice O'Connor, joined by Justice Blackmun, concurred in the opinion and wrote separately to emphasize that the "satisfactory explanation" must be the actual reason for the delay presented to the district court, not a *post hoc* explanation. *Id.* at 267-68.

After the *Ojeda Rios* decision, the United States filed its brief responding to Petitioner's petition and agreed that the case should be remanded for reconsideration in light of *Ojeda Rios.* (Brf. for the United States at 8.) The United States expressly conceded both that there was a delay in sealing the tapes and that "the government did not explain the reason for the delay." (*Id.*)

By order entered June 25, 1990, the Court granted the petition, vacated the judgment and remanded the case to the court of appeals for further consideration in light of *Ojeda Rios. Vastola v. United States,* 497 U.S. 1001 (1990).

5. On remand, the court of appeals directed that the parties file briefs on the issues raised by *Ojeda Rios*. Notwithstanding the Government's previous representations, the Government now contended for the first time that there was no delay in sealing the tapes because a subsequent order to intercept communications at different premises and over different telephones was in fact an "extension" of the earlier orders and, therefore, no sealing was required until termination of the subsequent order. As a result, the sealing of the tapes at issue was not only timely, but premature!

Alternately, the Government proposed that, even if the subsequent order was not an extension, "the United States Attorney's Office" believed in good faith that it was and "[s]uch a misunderstanding is a satisfactory explanation for the alleged delay." (Gov. Brf. on Remand at 17, citing *Ojeda Rios*.) With respect to what it described as the difficult burden of demonstrating at this point in time the actual reason for the delay, the Government complained that "five years have since passed," that "all of the attorneys involved in the supervision of the wiretaps in this case have since left the United States Attorney's Office," and "Not surprisingly, memories have faded." (*Id.* at 15-16.) The Government added that "there was no reason for anyone to have a clear recollection of the circumstances surrounding the sealing of the tapes." (*Id.* at 17.) The Government therefore urged that the convictions be reinstated.

In reply, Petitioner set forth in detail the actual terms of the electronic surveillance applications and orders and the chronology of events, which exposed the Government's new contentions as baseless. In light of those incontrovertible record facts, Petitioner urged that the Government's new theory was redolent of the very kind

of explanation, offered after the fact, about which the *Ojeda Rios* Court appeared to warn. *See* 495 U.S. 267-68.

6. The court of appeals flatly rejected the Government's new contention that there was no sealing delay, stating that the court "could not possibly hold that the [subsequent] interception order was an extension of the [earlier] order" and that "the statute unambiguously rules out this possibility." App. 80.

As to the Government's alternate contention, the court of appeals stated that "we cannot now on the record before us accept the government's suggestion that, even if erroneous, the supervising attorneys' reasonable belief that the [subsequent] order of June 26, 1985, extended the original interception order satisfactorily explains the delay." App. 83. The court noted that Petitioner "understandably protest[s] that the government's belated explanation not only is unsupported by the record but contradicts its specific assertions to this court and the district court that a delay occurred but that, under *Falcone*, it could not serve as a basis for suppression because the physical integrity of the tapes remained pure." App. 83.

The court, however, speculated that "while it is possible that the government offered no explanation for the delay because it had none, it is also possible that, acting in reasonable reliance on *Falcone*, it assumed that it could defeat the suppression motion by demonstrating the integrity of the tapes and thus did not find it necessary to introduce evidence on this point." App. 84. The court, therefore, ruled:

> Accordingly, we conclude that the district court should be entitled to exercise its discretion to decide whether the government should now be permitted, under *Rios*, to offer an explanation for its violation of the sealing requirement. It seems to us that this threshold determination

> should be made by the district court rather than by us as the nature of the determination is similar to that on a ruling on a motion by the government to reopen, traditionally a discretionary matter for the district court. *See United States v. Blankenship*, 775 F.2d 735, 740-41 (6th Cir. 1985).

App. 84-85.

7. Petitioner again petitioned this Court, seeking a writ of certiorari to review the question whether, under 18 U.S.C. § 2518(8)(a) and *Ojeda Rios*, an explanation for a sealing delay may be supplied for the first time on remand as a matter of a district court's "discretion." The United States opposed the petition as raising a question not yet ripe for review since, if the district court were to exercise its discretion to foreclose an explanation or were to find the explanation not "satisfactory," the tapes would be suppressed, and if the court rejected Petitioner's arguments, Petitioner could appeal that ruling to the court of appeals and, should he obtain no relief, could petition this Court. (Brf. for the United States at 5-6.) The petition was denied. *Vastola v. United States*, 498 U.S. 1120 (1991).

8. On remand from the court of appeals, the district court conducted an evidentiary hearing on December 14, 1990, five and a half years after the sealing delay and more than three years after Petitioner's suppression motion had been decided. At the hearing the Government offered the testimony of two attorneys in private practice, Thomas Roth and Diana Armenakis. Roth, who had been out of the United States Attorney's Office for three and a half years, held the position of Deputy Chief of the Criminal Division and Chief of Narcotics during the period of January to August, 1985. Armenakis, who had been out of the Office for over five years, was responsible for the electronic surveillance in this case, her first experience with electronic surveillance. Petitioner introduced a

number of documentary exhibits during cross-examination of Roth and Armenakis. Subsequent to the hearing, the district court held that the Government was entitled to offer a belated explanation for the delay and that the explanation offered – Armenakis mistakenly thought that sealing was not required until termination of all the electronic surveillance – was satisfactory because her mistaken view of the law was objectively reasonable. App. 186-91, 199-202. The court therefore ordered Vastola's convictions reinstated.[2]

9. Petitioner again appealed, including appealing for the first time from the judgment of conviction on the RICO violation based on a pattern of racketeering activity. Petitioner asserted that, given the requirement of § 2518(8)(a) that a satisfactory explanation for the absence of a seal "shall be a prerequisite" for the use of the intercepted communication, the district court had erred in holding that the Government was free, on remand and more than five years after the fact, to offer an explanation for its violation of the sealing requirement; that the government failed to sustain its burden of proving a satisfactory explanation for the sealing delay; and that Petitioner's conviction on the RICO violation could not stand because one could not determine whether the jury had found, as required for conviction, two racketeering acts as to which there was sufficient evidence of guilt.

As to Petitioner's claim regarding the "prerequisite" requirement of § 2518(8)(a), the court of appeals held that "whatever merit this argument may have had, our case law clearly holds that the district court has the discretion

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[2] Petitioner was resentenced on the counts which the court of appeals had originally affirmed and was sentenced for the first time on the count as to which the court of appeals had reversed the district court's order setting aside the guilty verdict.

to allow the government to offer a post-conviction explanation where no explanation had been given before" and the district court had not "abused its discretion" by allowing the Government to offer its explanation for the sealing delay. App. 37, 40. However, the court went on, Armenakis' mistaken view of the law regarding sealing was *not* "objectively reasonable." App. 45. Nevertheless, the court held, an attorney's mistake of law, even though objectively unreasonable, can still be a "satisfactory explanation" for a sealing delay if "the attorney involved acted as a 'reasonably prudent' attorney to investigate the legal question involved in a reasonably prudent manner," i.e., "if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably." App. 45. Since "the district court did not determine whether Armenakis conducted herself reasonably under the circumstances," the court of appeals once more vacated Petitioner's judgment of conviction and again remanded the matter to the district court, instructing it to consider "the reasonableness of Armenakis' inquiry into the law" as to the sealing of the tapes at issue. App. 46, 56-57.

The court also held that the presumptions of *Powell v. United States*, 469 U.S. 57 (1984), and of *Griffin v. United States*, 502 U.S. 46 (1991), could be applied in tandem to uphold Petitioner's RICO conviction, even though there was *both* an inconsistency between the verdict on that count and the remaining counts, suggesting that the jury did not find the requisite number of predicate acts for a RICO conviction, *and* it was also not possible to determine within the RICO count whether the jury relied on a predicate offense for which there was insufficient evidence. App. 54-55.

11. On the second remand, the district court, after briefs were submitted by the parties, held that Armenakis' inquiry into the law – admittedly inadequate research, but complemented by conversation with colleagues – was reasonable. App. 173-75. The court again reinstated the judgment of conviction.

12. Petitioner appealed once again. The court of appeals affirmed, one judge dissenting. The majority, addressing the question whether the Government had proven that Armenakis conducted adequate legal research or otherwise acted as a reasonably prudent attorney in arriving at a misunderstanding of the immediate sealing requirement, held that "Armenakis' conduct at the time in question was minimally sufficient to meet the standards of a reasonably prudent attorney." App. 13. Noting that "Armenakis' conduct is far from a model for others to follow," that "her research, standing alone, cannot be considered adequate," and that "her conversations with other attorneys, standing alone, were also insufficient," the majority nevertheless concluded that "the combined impact of these concurring sources created a degree of certainty (albeit minimal) which a prudent attorney could have accepted in arriving at an appropriate procedure for sealing." App. 9-10, 11.

The dissenter, stressing that under *Ojeda Rios* the Government bore the burden of providing a "satisfactory explanation" for its failure to comply with the immediate sealing requirement, pointed out that "the government's explanation is not 'satisfactory' as that term has been interpreted by . . . the Supreme Court in *Ojeda Rios*" and that the majority's opinion "effectively eliminate[s]" the Government's burden under *Ojeda Rios*. App. 15, 25.

Petitioner's petition for panel rehearing and rehearing in banc was denied, three judges voting to grant rehearing. App. 306-07.

REASONS FOR GRANTING THE PETITION

I

The Court of Appeals' Decision Investing The District Court with The "Discretion" to Permit The Government to Provide An Explanation for The Sealing Delay on Remand Is Contrary to The Plain Command of 18 U.S.C. § 2518(8)(a) And This Court's Holding in *Ojeda Rios*.

1. In *United States v. Ojeda Rios*, 495 U.S. 257, the Court pointed out that "[s]ection 2518(8)(a) has an explicit exclusionary remedy for noncompliance with the sealing requirement, providing that '[t]he presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, *shall be a prerequisite* for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom . . . . ' " *Id.* at 260 (footnote omitted) (emphasis added), *quoting* § 2518(8)(a). In remanding the case before it for further proceedings, the *Ojeda Rios* Court stated that the explanation offered to the Court "is not 'satisfactory' within the meaning of the statute unless it was relied on *at the suppression hearing* to explain the sealing delays." *Id.* at 267 (emphasis added). *Ojeda Rios* thus indicates, consistent with the "prerequisite" language of the statute, that the Government must explain a sealing delay *before* making use of tapes and is not permitted to supply an explanation for the first time following appeal, i.e., after the tapes have been used to obtain a conviction.

Here, the court of appeals disregarded the directive of the statute and of *Ojeda Rios* by investing the district court with the "discretion" to permit the Government to supply the actual reason and explanation for the sealing delay *after* the suppression motion was litigated, *after* the evidence had been used at trial, *after* appellate review, and *after* the court of appeals had itself declined to accept the explanation proffered to that court – albeit without

any basis in the record – following remand from this Court. The court of appeals dispatched Petitioner's claim regarding the "prerequisite" requirement of § 2518(8)(a) by stating simply that "whatever merit this argument may have had, our case law clearly holds that the district court has the discretion to allow the government to offer a post-conviction explanation where no explanation had been given before." App. 37.

Reducing compliance with the command of § 2518(8)(a) and with the holding of *Ojeda Rios* to a matter committed to a district court's "discretion" trivializes that command and eviscerates that holding. The Court in *Ojeda Rios* directed a remand solely for a determination whether the explanation offered to this Court was the same as had been offered to the district court, not to provide the Government with an opportunity to supply an explanation never given. *Ojeda Rios'* proscription of *post hoc* explanations is impelled by the plain language of the statute, i.e., that a satisfactory explanation is a "prerequisite" for use of tapes sealed untimely; by principles of waiver, i.e., the Government cannot rely on a reason not presented when the issue was first litigated, or contrary to a position previously taken, *see Steagald v. United States*, 451 U.S. 204, 208 (1981); and, presumably, by recognition of the unpleasant realities of litigation, i.e., the increased potential for creating or enhancing an "explanation" years after the event or tailoring an explanation to conform to recently articulated legal standards, and the possibility that avoidance of a retrial may incline district courts toward finding the belated explanation "satisfactory." *See United States v. Massino*, 784 F.2d 153, 159 (2d Cir. 1986) (prompt explanation for sealing delay will "avoid after-the-fact explanations for lapses actually caused by oversight or neglect and will eliminate the

need for courts to rely long after the fact upon the memories of agents as to the reasons for delays").

None of these risks are present in cases like *Ojeda Rios* itself, where the reason given at the suppression proceeding is a matter of record and cannot be created, changed, enhanced or tailored. Such a case involves a simple historical inquiry into the explanation already memorialized in the hearing transcript or government affidavits. Here, on the other hand, the Government itself, complaining on remand to the court of appeals about the difficulty of demonstrating at that point in time the actual reason for the delay, asserted that "five years have since passed," "all of the attorneys involved in the supervision of the wiretaps in this case have since left the United States Attorney's Office," "Not surprisingly, memories have faded," and "there was no reason for anyone to have a clear recollection of the circumstances surrounding the sealing of the tapes." (Gov. Brf. on Remand at 15-17.) Under these circumstances, according the district court the discretion to permit the Government to supply an after-the-fact explanation for the sealing delay – memories presumably having been restored – and then to hold that the district court did not "abuse its discretion" in permitting an explanation, is contrary to the directive of *Ojeda Rios*.[3]

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[3] The court of appeals, seemingly intimating that the *Ojeda Rios* decision was shaky, adverted to the concurrences of Justices O'Connor and Blackmun and stated that "[w]ithout these votes, *Ojeda Rios* may have been a plurality decision, as three justices dissented." App. 83 n. 18. Whatever the court of appeals' purpose in making that statement may have been, it is perplexing. First, Justice O'Connor's concurring opinion indicates that the Government should satisfy a *more* rigorous standard on remand, not a less rigorous one. Second, the *Ojeda Rios* dissenters would have affirmed the decision of the courts below

When, as it did here, this Court grants certiorari, vacates the judgment of the court of appeals and remands for reconsideration in light of an intervening decision of the Court – in this case *Ojeda Rios* – the court of appeals must heed that decision. *Hutto v. Davis*, 454 U.S. 370, 372 (1982). The court of appeals did not do so and, therefore, certiorari should again be granted, and the judgment reversed. *See id.*

2. The district court reasoned that in light of *United States v. Falcone*, 505 F.2d 478, which had held that a sealing delay did not require suppression in the absence of tampering, the Government had "no reason" to offer an earlier explanation for the sealing delay. App. 187. Thus, the court concluded, "[t]o prohibit the government from offering an explanation concerning the sealing delay as it did not present its explanation at the time of the suppression motion would be grossly unfair as *Falcone* did not require the presentation of such evidence to defeat the motion to suppress." App. 188. The court of appeals found this conclusion not to be an "abuse of discretion," agreeing with the district court's reasoning, and noting that *Ojeda Rios* was distinguishable since "[t]he government there offered a reason for the delay *before* the evidence was admitted [though a question remained as to whether the proffered explanation at trial was the same one determined to be reasonable on

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suppressing the tapes, irrespective of the Government's misunderstanding of the law. 495 U.S. at 268-70. Consequently, the opinion of the Court represents the view most favorable to the Government, not least favorable. Inferentially, if the explanation proffered for the delay was not the actual reason presented to the district court at the time of the suppression proceedings, every member of this Court would have required suppression.

appeal]" while "[t]he government here offered no explanation, choosing instead to rely on *Falcone*." App 37-38 (emphasis and bracketed clause the court's).

Petitioner submits that, even if a court were authorized to excuse noncompliance with the plainly worded requirements of § 2518(8)(a), the conclusion of the courts below fails to reckon the distinction between the Government's statutorily mandated obligation to comply with the sealing requirements of § 2518(8)(a) and the very different question of the Government's surviving a suppression motion.

Under § 2518(8)(a), an explanation for a sealing delay is required as a prerequisite to the use of tapes *even if a defendant never moves to suppress the evidence*. When tapes are sealed late, it is not uncommon for the supervising attorney to provide the sealing judge with the explanation for the delay at the time of sealing. Indeed, that happened *in this very case*, with respect to other tapes, when another Assistant United States Attorney, upon learning that two of the original tapes had not been sealed in 1985 due to a clerical error, presented them to a district court judge for sealing a year later, together with affidavits fully explaining the reason for the delay. (CA App. on initial appeal at 203-16.) This was before the indictment had even been filed and, obviously, before Petitioner had ever moved to suppress the tapes. The reason that the Assistant United States Attorney provided the explanation was undoubtedly because the statute *required* an explanation as a prerequisite to the tapes' use – regardless of any prospective suppression motion.

Thus, the district court was wholly incorrect in stating there was "no reason" to provide an explanation for the sealing delay in light of *Falcone*. The Government *had* both a reason – the statute required it as a prerequisite to the tapes' use – and the opportunity – at *any* time prior to

the tapes' use, whether by affidavit or otherwise, and regardless of any motion to suppress. Of course, the defendants' motion to suppress also gave the Government additional, specific notice to provide an explanation for the delay. *Cf. Rakas v. Illinois*, 439 U.S. 128, 130 (1978) (denying petitioners' request that, should Court reject their "legitimately on premises" argument on Fourth Amendment standing suggested by Court's earlier decisions, case should be remanded for findings on petitioners' ownership interest in seized property, and pointing out that "the prosecutor's argument gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden"). To permit the Government to present its explanation years later rewards "sandbagging" – withholding an argument in order to use it in the event another argument is ultimately unsuccessful. *See Wainwright v. Sykes*, 443 U.S. 72, 89-90 (1977).

It must nevertheless be noted that if the Government, in declining to supply the reason and explanation for the sealing delay, relied to its detriment on *Falcone*, this would not excuse its default, since under no reasonable view of *Falcone* was the Government ever relieved of its statutory obligation to provide an explanation. In *Falcone*, where tapes had not been promptly sealed, the Court stated that "the tapes were not sealed in accordance with the statute" and described the delay as a "procedural error." 505 F.2d at 483. In concluding, however, that the failure to promptly seal did not necessarily require the remedy of suppression, the Court pointed out that its conclusion was supported by the fact that Congress had "provided an alternative to the sealing requirement," namely, *a satisfactory explanation*. *Id.* at 484. Indeed, the court actually noted some possible "satisfactory explanations." *Id.* As to the remedy of suppression, the Court

stated that the integrity of the tapes is the crucial factor, and that in the case before it the district court found that they had not been tampered with. *Id.* The Court, however, took care to expressly narrow its holding:

> Therefore, all we hold is that where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom.
>
> We hasten to add that *this holding, of course, does not deprecate the importance of the sealing requirement. Certainly, it should be complied with in all respects.* As this case so aptly demonstrates, compliance would have avoided considerable uncertainty and delay.

Id. (emphasis added). Thus, no one could reasonably rely on *Falcone* as dispensing with the need to furnish a satisfactory explanation for a sealing delay. *Falcone* did not hold that the Government may *either* explain the reason for a delay in sealing tapes *or* demonstrate the integrity of the tapes. The Government was required to comply with the statute, and the statute commanded, as the *Falcone* court itself expressly noted, that a satisfactory explanation be given where there had been a delay in sealing.[4] Consequently, the Government could not have justifiably relied on *Falcone* in failing to offer an explanation,

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[4] Even the Government begrudgingly acknowledged in the court of appeals that Petitioner may well be right in asserting that under *Falcone* a satisfactory explanation for a sealing delay was still required. (Gov. Brf. on second appeal at 25.) The Government's answer, however, was that it *had* an explanation, but simply did not *present* it! (*Id.*)

because *Falcone* did not relieve the Government of that duty.[5]

Knowledge of the actual reason and explanation, if any, for the failure to immediately seal the tapes was peculiarly within the province of the Government from the time of the sealing delay. Nevertheless, the Government declined to supply the explanation at the time of the suppression motion even though, ironically, it could not possibly have been unfairly prejudiced by doing so since *Falcone* – while requiring compliance with the sealing statute in all respects – did not mandate the remedy of suppression in the absence of tampering. Consequently, the district court erred in concluding that it would be "grossly unfair" to prohibit the Government from offering a belated explanation concerning the sealing delay.

3. In keeping with the statute and *Ojeda Rios*, the courts below should have rejected out of hand the Government's request to provide such an explanation, since there is simply no valid basis for treating the request as a matter committed to the district court's discretion. The court of appeals' reasoning was flawed in analogizing the Government's request to a motion by the Government to reopen, traditionally a discretionary matter for the district court. A district court's discretion to allow the Government to reopen is just another manifestation of the

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[5] Unfortunately, the Government, at least in the Criminal Division of the U. S. Attorney's Office in Newark, took *Falcone* as a license to ignore the sealing requirements of § 2518(8)(a). Roth's testimony was very revealing in this regard. He testified that, unlike in the Eastern District of New York, where he had previously worked, sealing "was not an overwhelming concern in New Jersey" because suppression was not a viable option unless there was tampering. (CA App. on last appeal at A 43-44) The majority in *Falcone* could hardly have contemplated such a perverse application of its holding.

court's broad and time-honored power to control the mode and order of proof at trial. *See, e.g.*, Fed. R. Evid. 611(a); *Geders v. United States*, 425 U.S. 80, 86 (1976); *United States v. Blankenship*, 775 F.2d at 740-41. In such a context, the court's exercise of discretion is informed by the judge's unique overview of the trial as it has unfolded before him or her in one continuous proceeding.

Here, on the other hand, a ruling on the Government's request to supply, five years later, the actual reason and explanation for the sealing delay is not a trial matter traditionally left to a district court's discretion. Since the inquiry focuses on conduct occurring at the time of the sealing delay, which precedes even the indictment, the district court's overview of the case, and specifically the trial proof, is as beside the point as it would be if the court were deciding the objective reasonableness of a police officer's reliance on a search warrant executed before the defendant's arrest. Rather, the sealing issue is a statutory matter whose resolution must be informed by the language of the applicable statute. In unambiguously providing in § 2518(8)(a) that a satisfactory explanation for the absence of a seal "shall be a prerequisite" for the use of intercepted communications, Congress has placed such a determination beyond a district court's discretionary powers. Moreover, the passage of five years, along with the attendant changed circumstances and personnel, makes any analogy to a motion to reopen artificial.

For all these reasons, the Court should grant certiorari and hold that § 2518(8)(a) precluded the Government from providing for the first time on remand the reason and explanation for a delay in sealing tapes used at trial.

II

The Court of Appeals Further Undercut *United States v. Ojeda Rios* by Holding That The Government Attorney's Mistake of Law, Although Objectively Unreasonable, Was Nevertheless A "Satisfactory Explanation" For The Sealing Delay Because The Attorney Investigated The Legal Question In A Reasonably Prudent – Albeit Minimally So – Manner.

4. In *Ojeda Rios* the Court stated: "In establishing a reasonable excuse for a sealing delay, the Government is not required to prove that a particular understanding of the law is correct but rather only that its interpretation was objectively reasonable at the time." 495 U.S. at 266. The court of appeals found that Armenakis' misunderstanding of the law was *not* objectively reasonable. App. 45. Under *Ojeda Rios*, the inquiry should have ended there, and the tapes ordered suppressed.

The court of appeals, however, went on to add a second level of inquiry, one cutting against the first: an attorney's mistake of law, even though objectively unreasonable, can still be a "satisfactory explanation" for a sealing delay if "the attorney involved acted as a 'reasonably prudent' attorney to investigate the legal question involved in a reasonably prudent manner," i.e., "if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably." App. 45. The court cited as the sole authority for this proposition its holding in *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992), another sealing delay case. *Carson* itself, however, had cited no authority and engaged in no analysis, but simply declared that proposition to be so, *Ojeda Rios* notwithstanding. *Id.* at 1494. The court of appeals' approach vitiates the holding of *Ojeda Rios* because it excuses a sealing delay based on a misunderstanding of the law unless the misunderstanding is *both*

objectively unreasonable *and* the government attorney did not act reasonably in arriving at that unreasonable misunderstanding.

Despite its apparent self-contradiction, there is some support in cases dealing with qualified immunity from suits based on Fourth Amendment violations for the idea that one can reasonably act unreasonably. *See Anderson v. Creighton*, 483 U.S. 635, 643 (1987); *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir. 1994). But two distinct reasonableness inquiries are being made in such cases: one into the lawfulness of the police officer's conduct and the other into the officer's entitlement to qualified immunity. As the Court in *Anderson v. Creighton* pointed out, all Fourth Amendment violations are by definition "unreasonable," but a police officer who makes an objectively reasonable determination that his conduct is lawful in executing a search or seizure should not be held personally liable for damages, even though the evidence is properly suppressed under the Fourth Amendment. 483 U.S. at 643-44.

This special compound analysis, however, has no application to the simple suppression question formulated by *Ojeda Rios*: whether, in establishing a reasonable excuse for a sealing delay, the Government has proven its misunderstanding of the law was objectively reasonable. Once it is established that the government attorney's misunderstanding was not objectively reasonable, the tapes must be suppressed, as in the Fourth Amendment context, and no further inquiry is warranted. Since the court of appeals put an inappropriate gloss on *Ojeda Rios*, which would shield violations of § 2518(8)(a) based objectively unreasonable mistakes of law, certiorari should be granted.

III

The Government Did Not Sustain Its Burden of Proving A Satisfactory Explanation for The Sealing Delay, And The Court of Appeals' Holding "Effectively Eliminate[s]" The Government Burden under *Ojeda Rios*.

5. The dissenter in the court of appeals, Judge Stapleton, stated:

> If the government's evidence in this case is sufficient to carry its burden of providing a 'satisfactory explanation' for failing to comply with the immediate sealing requirement of the statute, the requirement is reduced to a precatory entreaty. Because it is clear from *Ojeda Rios* that Congress intended something more, I respectfully dissent. App. 15.

Judge Stapleton added that "[t]o hold that this record suffices to carry the government's burden under *Ojeda Rios* would effectively eliminate that burden and would ill serve the privacy concerns underlying the sealing requirement of the statute." App. 25.

For the reasons more fully stated in the dissenting opinion in the court of appeals (App. 15-26), certiorari should be granted so that the Court can determine whether the Government sustained its burden of proving a satisfactory explanation for the sealing delay.

IV

The Presumption of *Powell v. United States*, 469 U.S. 57 (1984), And The Presumption of *Griffin v. United States*, 502 U.S. 46 (1991), Should Not Be Applied in Tandem, Because It Increases Exponentially The Risk That A Defendant Was Not Properly Found Guilty.

6. The general guilty verdict on Count One, charging a RICO violation based on a pattern of racketeering activity, was inconsistent with the verdicts on the non-

RICO counts of the indictment. Those counts alleged the same offenses charged as racketeering acts, yet the jury did not find Petitioner guilty of any count that would comprise the requisite second racketeering act. The inconsistency between the verdicts, of course, is not grounds for setting the conviction aside because, under *Powell v. United States*, 469 U.S. 57 (1984), "it is unclear whose ox has been gored," i.e., although such a verdict may mean the jury was not convinced of the defendant's guilt, it is "equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* at 64-65. For prudential reasons, according to *Powell*, it must be presumed that the latter possibility occurred, and inconsistent verdicts are therefore insulated from review. *Id.* at 66-69.

Here, however, in addition to the inconsistency, nowhere in any of its verdicts, whether general or special, whether RICO or non-RICO, did the jury find that Petitioner committed any racketeering act other than a single one relating to an extortion conspiracy against an entity named MCA. Consequently, it was impossible to determine what other racketeering act, if any, the jury may have relied upon in reaching its verdict on Count One, which required a minimum of two such acts. And the evidence with respect to at least some of them was insufficient. This is also not grounds for setting Count One aside, however, because, under *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466 (1991), the jury is presumed to have convicted on a ground supported by adequate evidence,

and the possibility that the jury convicted on a ground that was not is "remote." *Id.*, 112 S.Ct. at 474.[6]

On the other hand, where there is an inconsistency between verdicts in a multi-count indictment, the inconsistency, while not in itself grounds for setting aside a verdict, at the very least cuts against a presumption that the jury acted rationally. Consequently, Petitioner submits that where an indictment alleges multiple predicates for a compound crime like RICO, the evidence must be sufficient to prove all of them if a court cannot determine which predicates the jury relied upon in reaching its guilty verdict *and* other irregularities in the verdict, for example inconsistency, reflect ambiguity or juror confusion. In such cases, unlike in *Powell*, it is no longer "equally possible" that the defendant or the Government was disadvantaged. And, unlike in *Griffin*, the chance is by no means "remote" that the jury convicted – or under *Powell* is deemed to have convicted – on a ground that was not supported by adequate evidence.

Thus, where in addition to an inconsistency *between* verdicts on different counts of an indictment, raising the possibility that the jury did not find the requisite number of predicate acts, it is also not possible to determine *within* a verdict on a compound count the specific predicate offenses the jury relied upon in reaching its verdict on that count, the risk that the jury did not properly find the defendant guilty is increased exponentially by combining the presumptions of *Powell* and *Griffin* to speculate both that the jury must have convicted on a sufficient

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[6] Indeed, under the circumstances in *Griffin*, in which the defendant was charged in only one count of an indictment, there was virtually no such chance, since nothing in the verdict indicated any confusion on the jurors' part. In short, jurors are presumed to have followed the court's instructions and acted rationally.

number of predicate offenses and that those predicate offenses must have been the ones supported by sufficient evidence. In the face of such an inscrutable verdict, this kind of far-reaching conjecture offends due process and diminishes the right to trial by jury.

The court of appeals stated, ironically, that *Petitioner's* argument "would require that we speculate about the jury's deliberation" and "we will not reverse a conviction based on speculations about the jury's rational deliberation process." App. 54, 55. But that is exactly what a court does – far more speculatively – when it upholds a conviction by combining the presumptions of *Powell* and *Griffin* and assuming that the jury acted rationally, where the verdict itself does not support that assumption. The Court should therefore grant certiorari and hold that applying *Powell* and *Griffin* in tandem creates too great a risk of a defective conviction to satisfy due process and the right to a jury trial.

V

The Distinction under RICO between Participating with Others in The Affairs of An Enterprise And Conspiring with Those Others to Participate in The Affairs of The Enterprise Is Unclear, Particularly Where A Requisite Predicate Act Is Itself A Conspiracy And The Defendant Did Not Agree to Commit An Unlawful Act Himself.

7. The court of appeals reversed one of Petitioner's RICO convictions under 18 U.S.C. § 1962(c) because there was insufficient evidence that Petitioner participated in the conduct of the alleged enterprise's affairs through collection or attempted collection of a particular unlawful debt, noting along the way that the proof also did not establish that Petitioner played a supervisory role with respect to the two individuals involved in the collection.

App. 120-25. Nevertheless, the court concluded that Petitioner could be properly convicted under 18 U.S.C. § 1962(d) for conspiring to participate in the affairs of the enterprise through collection of the same unlawful debt (App. 125-29) and further, that he could be properly convicted under 18 U.S.C. § 1962(c) for participating in the affairs of the enterprise through a pattern of racketeering activity, with the conspiracy to collect the unlawful debt furnishing one of the two requisite racketeering acts. App. 55-56. According to the court of appeals, Petitioner could be convicted on both of these RICO theories because, although he did not know the details of the loan, he "knew the loan was unlawful and with that knowledge, *encouraged* [one of the individuals] to collect it." App. 129 (emphasis added).

The court of appeals' tripartite holding raises three important, interrelated questions regarding RICO. First, since the crime of conspiracy requires not only knowledge of the conspiracy's objective, but participation in the scheme, *see Blumenthal v. United States*, 332 U.S. 539, 550 (1949), what is the distinction between participating with others in the affairs of an enterprise through collection of an unlawful debt and conspiring with those others to participate in the affairs of the enterprise through collection of that debt? Second, in order to be convicted of a RICO conspiracy must a person agree to commit personally a predicate act or merely agree to commission of the act, a question as to which the circuits are in conflict.[7]

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[7] The court of appeals in this case followed *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 971 (1985), which held that the defendant need not agree to commit the act personally. App. 128. The Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh circuits agree. *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990); *United States v. Joseph*, 781 F.2d 549 (6th Cir. 1986); *United States v. Stern*, 858 F.2d 1241 (7th Cir. 1988);

Third, may a RICO conviction, and in particular a RICO conspiracy conviction, rest on a predicate act which is itself a conspiracy.[8]

Collectively, these questions would require the Court to determine definitively the essential elements of a RICO conspiracy. In *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993), the Court definitively construed the phrase "to conduct or participate, directly or indirectly in such enterprise's affairs," as that phrase is used in 18 U.S.C. § 1962(c). A similar authoritative construction of the phrase "to conspire to violate any of the provisions of [18 U.S.C. § 1962(a), (b) or (c)]," as used in 18 U.S.C. § 1962(d) is warranted, since both RICO indictments and RICO civil complaints routinely allege RICO conspiracies under 18 U.S.C. § 1962(d) in addition to RICO substantive violations under 18 U.S.C. § 1962(c), *see, e.g., National Organization for Women, Inc. v. Scheidler*, 114 S.Ct. 798, 802 (1994), and since the distinction, if any, between these subsections, as well as the proof required for each, is elusive. That Petitioner could be convicted of violating both subsections solely on the basis of knowing about and *encouraging* collection of a debt, even though Petitioner was found not to have participated in the conduct

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United States v. Leisure, 844 F.2d 1347 (8th Cir. 1988); *United States v. Tille*, 729 F.2d 615 (9th Cir. 1984); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986). The First and Second circuits disagree and require an agreement by the defendant to commit the act personally. *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981); *United States v. Ruggiero*, 726 F.2d 913 (2d Cir. 1984).

[8] Although the court of appeals did not expressly address this question, which was raised in both that court and the district court, the court of appeals subsequently held in *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), that a conspiracy may serve as a predicate for a RICO conspiracy. *Id.* at 1134-35.

of the alleged enterprise's affairs through collection or attempted collection of that debt or to have played a supervisory role with respect the two individuals involved in the collection, is testament to the subsections' opacity and their capacity for boundless and arbitrary application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 31, 1994

Respectfully submitted,

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